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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 176

FELIX BENITEZ REXACH,
PETITIONER,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	16
Appendix A — Opinions Below of the United States District Court for the District of Puerto Rico	17
Appendix B — Opinion Below of the United States Court of Appeals for the First Circuit	23
Appendix C — Opinion Below of the Board of Review on the Loss of Nationality	26
Appendix D — Statutes Involved	32

Table of Citations

Authorities

Beys Afroyim v. *Dean Rusk*, 387 U.S. 253, 87 S.Ct. 1600	8
Curry v. *McCanless*, 307 U.S. 367, 83 L. Ed. 1339	16
Czaplicki v. *The Hoegh Silvercloud*, 351 U.S. 525, 100 L. Ed. 1387, 76 S.Ct. 946	11
Fitch, et al. v. *Wisconsin Tax Commission, et al.*, 230 N.W. 37, 201 Wis. 383	14
Linzalone v. *Dulles*, 120 F. 2d 107	11
Local No. 438 v. *Curry*, 371 U.S. 542, 9 L. Ed. 514, 83 S.Ct. 531	2
Luria v. *United States*, 231 U.S. 9, 58 L. Ed. 101, 34 S.Ct. 10	13
McKenzie v. *Hare*, 239 U.S. 299, 60 L. Ed. 297, 36 S.Ct. 106	10

Page

M'Culloch v. *The State of Maryland, et al.*, 4 Wheat 316, 4 L. Ed. 579 14
Michigan R. Com. v. *Detroit & M. R. Co.*, 178 Mich. 230, 144 N.W. 696, affd. 240 U.S. 564, 60 L. Ed. 802, 36 S.Ct. 424 11
Mills v. *Alabama*, 384 U.S. 214, 16 L. Ed. 2d 484, 86 S.Ct. 1434 2
Perez v. *Brownell*, 356 U.S. 44, 2 L. Ed. 603, 78 S.Ct. 568 9
Pope v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 97 L. Ed. 1094, 73 S.Ct. 749 2
Pullman Co. v. *Richardson*, 261 U.S. 330, 67 L. Ed. 682, 43 S.Ct. 366 15
Redfield v. *Fisher*, 292 P. 813, 135 Or. 180 16
Schneider v. *Rusk*, 377 U.S. 163, 12 L. Ed. 2d 218, 84 S.Ct. 1187 8
Shields v. *Utah Idaho C.R. Co.*, 305 U.S. 177, 83 L. Ed. 111, 59 S.Ct. 160 11
Tait v. *Cook*, 256 U.S. 47, 68 L. Ed. 895 12
Union Refrigerator Transit Co. v. *The Commonwealth of Kentucky*, 199 U.S. 194, 50 L. Ed. 150 15
U. S. v. *Cruikshank*, 92 U.S. 542 13
Yamamoto v. *Acheson*, 93 F. Supp. 346 10

Statutes

8 USC 1104 4
8 USC 1481 3
26 USC 871, 1958 Ed. Sec. 871 3
28 USC 1254 2
28 USC 1292 2
28 USC 1340 8
28 USC 1345 8

	Page
46 USC 11	4
46 USC 731	3
Act of March 2, 1917, C. 145, 39 Stat. 951	3, 18

Miscellaneous

22 C.F.R., Rev. as of Jan. 1, 1967, Ch. 1, Subch. F. 50.50(a)	4
22 C.F.R., Rev. as of Jan. 1, 1967, Ch. 1, Subch. F. 50.50(b)	4
22 C.F.R., Rev. as of Jan. 1, 1967, Ch. 22, Subch. F. 50.2	6
22 C.F.R., Jan. 1, 1967, Rev., Ch. I, Subch. F. 50.60-50.72	7
3 Am. Jur. 2d 982	13
2 Am. Jur. 2d 291-292	11
Black's Law Dictionary, 3rd Ed., pg. 329	13

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FELIX BENITEZ REXACH, the Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The opinions of the United States District Court for the District of Puerto Rico entered November 24, 1967 and December 4, 1967 (Appendix A, infra., p. 17), are not

officially reported. The opinion of the United States Court of Appeals for the First Circuit entered March 11, 1968 (Appendix B, infra., p. 23) is officially reported at 390 F. 2d 631. The opinion of the Board of Review of Loss of Nationality entered June 25, 1962 (Appendix C, infra., p. 26) is not officially reported.

Jurisdiction

This is a petition for review on certiorari by defendant-appellant, Felix Benitez Rexach from an order filed and entered on March 11, 1968 of the United States Court of Appeals for the First Circuit affirming the order filed and entered by the United States District Court for the District of Puerto Rico on November 21, 1967, which denied petitioner's motion dated May 5, 1967 for summary judgment of dismissal of the amended complaint.

The jurisdiction of this Court is invoked under 28 USC 1254(1).[1]

Question Presented

The question invoked is whether during the period from July 18, 1958, when an administrative determination of loss of petitioner's nationality was made by the State Department, as evidenced by a Certification of Loss of

[1] Although a denial of a motion for summary judgment is ordinarily not a final judgment, it is the petitioner's contention that the judgment is final within the meaning of 28 USC § 1254 and within the scope of *Pope* v. *Atlantic Coast Line R. Co.*, 345 US 379, 381-383, 97 L Ed. 1094, 1098, 1099, 73 S. Ct. 749. *Local No. 438* v. *Curry*, 371 US 542, 548-551, 9 L Ed. 514, 518-520, 83 S. Ct. 531; *Mills* v. *Alabama*, 384 U.S. 214, 217-218, 16 L Ed. 2d 484, 487, 86 S. Ct. 1434. This finality is re-inforced by the fact that this order was certified to the U.S. Court of Appeals for the First Circuit by the U. S. District Court for the District of Puerto Rico under 28 USC 1292(4) (Appendix A, infra., pp. 21, 22), and by the fact that it was reviewed by the Court of Appeals.

Nationality, until such determination was reversed by the Board of Review for Loss of Nationality (June 25, 1962), the petitioner while residing in a foreign country, is taxable on foreign source income.

Statutes Involved

The following statutory provisions are set forth in Appendix D, infra., pp. 32-39: Section 349 of the Immigration and Nationality Act of 1952 (8 USC 1481), and Section 871 of the Internal Revenue Code of 1954, as amended through September 21, 1961 (26 USC 871, 1958 Ed.).

Statement of the Case

Petitioner, having been born March 27, 1886 in the Island of Vieques, a part of Puerto Rico, became on March 2, 1917 a citizen of the United States of America pursuant to the provisions of the Organic Act of Puerto Rico of 1917 (39 Stat. 951, 953; 48 USC 731, et seq.).

On July 14, 1958 Petitioner, then residing and being present in the Dominican Republic, made a formal and written renunciation of his United States citizenship before the U.S. Consular Office as provided for in Section 349(a)(6) of the Immigration and Nationality Act of 1952 (8 USC 1481(a)(6)) (Appendix D, p. 37).

> "(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by
>
> . . . . . .
>
> "(6) making a formal renunciation of nationality before a diplomatic or consular officer of the United

States in a foreign state, in such form as may be prescribed by the Secretary of State;. . .".

In the prescribed form

". . . . The renunciant must include on the form he signs a statement that he absolutely and entirely renounces his United States Nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining."

(22 U.S. Code of Federal Regulations, Rev. as of Jan. 1, 1967, Ch. 1, Subch. F, 50.50(a)).[2] The renunciation and Certificate of Loss of Nationality was approved by the Department of State July 18, 1958.[3]

Following this determination of loss of nationality the United States registration of petitioner's ships were cancelled since under statute (46 USC 11) vessels belonging to an individual not a citizen of the United States are not admissible to registry as American vessels and are not entitled to the benefits and privileges pertaining to an American vessel; and the U. S. Consular and Immigration Service took up his American passport and restricted his entry and transit into and through Puerto

---

[2] The regulations also provide that the consular official before whom the renunciation is made shall forward to the Secretary of State "the oath of renunciation together with the Certificate of Loss of Nationality as provided by Section 358 of the Immigration and Nationality Act. If the officer's report is approved by the Department, copies of the Certificate should be forwarded to the Immigration and Naturalization Service, Department of Justice, and to the person to whom it relates or his representative." (22 C.F.R., Rev. as of Jan. 1, 1967, Ch. I, Subch. F, 50.50(b)).

[3] By section 104 of the Immigration and Nationality Act of 1962, the Secretary of State is charged with the administration and enforcement of the Act and all other immigration and nationality laws and the determination of nationality of a person not in the United States, and with establishing regulations therefor (8 USC 1104).

Rico to that of a non-resident alien, and in all other respects he was treated as a non-resident alien of the United States. He was decreed to be a citizen of the Dominican Republic July 26, 1958 and held a passport issued by the Dominican Republic.

On May 30, 1961 the Dictator Trujillo of the Dominican Republic was assassinated by a group of Dominicans who sought to take control of the government. In this, the group was unsuccessful and almost all were hunted down and killed. The former Dictator's government did not immediately fall but was taken over by his son, Ramfis, aided by others of the Trujillo family, and it was not until several months later that the Trujillo family withdrew from the Island, and a new provisional government set up. Following this a series of interim governments were constituted but each quickly fell, and until the military intervention of the United States, followed by intense diplomatic activity resulting in the present government, unrest and chaos existed in the Dominican Republic.

Some time prior to March 2, 1962, Petitioner wrote the former American Ambassador to the Dominican Republic, that the renunciation of American citizenship he had made in 1958 was not voluntary but was impelled by duress of Dictator Trujillo, a copy of which letter was sent to his attorney. His attorney then advised him that if such was the case the renunciation would be set aside if the preponderance of the evidence showed it to be not voluntary, see decision of the Board of Review of Loss of Nationality, Appendix D, pp. 26-31. Up to that time it does not appear that petitioner knew that his renunciation was voidable.

On March 2, 1962 Petitioner filed with the U. S. Consul in Santo Domingo, D.R. an application for an American passport with his affidavit claiming that this renuncia-

tion in 1958 was not voluntary.[4] The Consul told petitioner that he was an alien, was entitled to no protection from the United States, and that no passport could be issued to him, but he referred petitioner's claim of citizenship to the State Department with the opinion that petitioner's renunciation in 1958 had resulted in loss of his nationality.

The Secretary of State treated the claim as an appeal to the Board of Review for Loss of Nationality from the determination of the Secretary of State of its loss by petitioner evidenced by the Certificate of Loss of Nationality issued July 18, 1958.[5]

After hearing, the Board, on June 25, 1962 rendered its decision in which it said:

> ". . . . Mr. Benitez Rexach has alleged and submitted corroborative evidence to the effect that his formal renunciation of United States citizenship was an act compelled by not only fear of financial loss or ruin, but also that he was in fact, in fear of his personal safety if he refused to obey the alleged commands of the Dominican Government to divest himself of his American Status."
>
> . . . . . .
>
> "Evidence rebutting or tending to affirm the contrary of Mr. Benitez Rexach's position on appeal is not particularly impressive nor present in any mag-

[4] Regulations of the Secretary of State provide:
"The Department shall determine claims to United States Nationality when made by persons abroad on the basis of an application for registration, for a passport, or for registration of birth."
(2 C.F.R., Rev. as of Jan. 1, 1967, Ch. 22, Subch. F, 50.2)

[5] In its decision the Board said:
"This matter comes before the Board of Review on the Loss of Nationality as an appeal from a determination by the Department of State, dated July 18, 1958, that Felix Benitez Rexach lost his United States citizenship . . ." (Appendix C, infra., p. 26)

> nitude. What little there is appears to lead to a conclusion that it was the Department's previous position that appellant acted totally out of self-interest and freely in renouncing his citizenship. . . . , the Board is of the opinion that the appellant's evidence. . . . successfully rebuts any presumption or allegation of fact of voluntariness by a preponderance."

and unanimously held as follows:

> "Accordingly, the Department's previous determination that Mr. Felix Benitez Rexach expatriated himself under Section 349(a)(6) of the Immigration and Nationality Act of 1952, as amended, is reversed." (Appendix C, infra., p. 31).

The Regulations provide that a person who contends that the State Department's administrative holding of loss of nationality is contrary to law and fact may appeal to the Board within reasonable time after notice of such determination; that the Board shall consider the appeal and take any action it considers necessary and proper to dispose of the case; that it shall receive evidence and if there is a hearing hear argument on the applicable facts and law; that the Board's decision shall be by a majority in writing and shall set out with particularity findings of facts and conclusions of law, shall make a transcript of the record and furnish copies, and that the Board's decision shall be promptly notified to appellant; that the Board shall consist of three members who are attorneys-at-law and experienced in the law of nationality and citizenship of the United States (22 F.C.R., Jan. 1, 1967 Rev., Ch. I, Subch. F, 50.60-50.72).

The Certificate of Loss of Nationality was cancelled and an American passport issued to petitioner.

By the amended complaint the United States (Commissioner of Internal Revenue) seeks to foreclose alleged tax liens to collect jeopardy assessments of income taxes for the calendar years 1959 and 1961 on alleged income received by petitioner from sources outside the United States. Jurisdiction in the United States District Court was based on Sections 1340 and 1345 of Title 28 of the United States Code.

Reasons for Granting the Writ

I.

Petitioner submits that in this case the United States Court of Appeals for the First Circuit has decided an important question of Federal Law, which has not been, but should be settled by this Court, and further that the decision of the Court of Appeals is in error and not in accordance with law.

The question presented in this case gives rise to a corollary question, that is, what is the effect of *Beys Afroyim* v. *Dean Rusk,* 387 U.S. 253, 87 S.Ct. 1600, on the benefits and liabilities of citizenship as to those individuals who by virtue of the *Afroyim* decision have been repatriated.

Does the *Afroyim* decision mean that individuals who though treated as non-citizens prior to the decision, should now in the wake of the decision be subject to the liabilities of citizenship for the period of de-facto non-citizenship?

The petitioner does not have records available as to the number of repatriations resulting from, or which will result from, the *Afroyim* decision or from the decision in *Schneider* v. *Rusk,* 377 U.S. 163 12 L. Ed. 2d 218, 84 S.Ct.

1187, but on the basis of Mr. Justice Clark's statement at page 173 U.S. in the latter case that:

> "In 1962 alone 919 persons were expatriated on the basis of residence in countries of former nationality."

the number will be substantial.

It is petitioner's contention that the status of those repatriated as a result of these decisions, with regard to the benefits and liabilities of citizenship during the period of de-facto non-citizenship, is clearly in doubt and should be resolved by this Court. Involved herein is a case which squarely presents this issue to the Court.

What was the legal status of the petitioner, as regards the benefits and liabilities of citizenship, during the period of time he was a de-facto non-citizen.

Petitioner is aware of no other case which raises this precise question.

The decision of the Court of Appeals for the First Circuit would seem to be a precedent for all questions of status arising during the so-called period of suspended or de-facto citizenship.

We believe that the effect of the decision of the Board of Loss of Nationality in reversing the decision of the Department of State in issuing the Certificate of Loss of Nationality to the petitioner, because said renunciation was involuntary is no different from the effect of the *Afroyim* decision on Mr. Perez (*Perez* v. *Brownell*, 356 U.S. 44, 2 L. Ed. 603, 78 S.Ct. 568), or the many others who lost their citizenship by voting in a foreign election; or different from the effect of the *Schneider* decision on Mrs. Schneider and the many others who lost their citizenship by residence in a foreign country of former nationality. Are Mr. Perez or Mrs. Schneider and others similarly

situated, during a period of non-residency in the United States, subject to taxation by the United States from the date of expatriation, on foreign source income because of the reversion of their citizenship as a result of *Afroyim* and *Schneider?*

As Mr. Chief Justice Warren said in his dissenting opinion in the case of *Perez* v. *Brownell,* supra:

> "This principle of 'reversion of citizenship was a familiar one in our own law and the law of foreign states. The statute was merely declarative of the law as it was then understood. . .".

The reference was to the case of *McKenzie* v. *Hare,* 239 U.S. 299, 60 L. Ed. 297, 36 S.Ct. 106, in which the Court sustained an act of Congress that a wife's American citizenship was suspended for the duration of her marriage to an alien. At the end of the period in question and as a result of the decision of the said Board of Review, petitioner was restored to her full rights of citizenship.

In the case of *Yamamoto* v. *Acheson,* 93 F.Supp. 346, 349, where loss of nationality was the result of duress, the court stated as a conclusion of law:

> "The plaintiff is entitled to have her purported expatriation cancelled and further entitled to be restored to her full rights of citizenship including the issuance of a passport; and to be adjudged a citizen of the United States.";

and entry of judgment to that effect was ordered. Such restoration is that of status as a citizen, but it cannot encompass the protection and other rights of citizenship which the petitioner could not and did not have during said period.

Is the United States Government to proceed on a case by case basis and say Perez is not subject to tax liability but Benitez Rexach is because the facts are different even though the principles involved are the same? Petitioner contends that a legal principle is involved which requires clarification if the effects of Afroyim and Schneider are to result in an orderly determination of the rights and liabilities of those individuals, during the period of so-called suspended citizenship.

The legal query re-stated is, does a person who in fact lost the privileges, benefits and rights of citizenship, and then has these privileges, benefits and rights returned, suffer the liabilities attached to citizenship during the period when he in fact did not have the rights, benefits and privileges of a citizen.

It was an actual fact not disputed by the government that during the period of 1958 through 1962 petitioner was regarded and treated as a non-resident alien, he was not treated as a non-citizen, his rights and liabilities were those of a non-resident and the limitations of non-citizenship attached to him for every purpose.

The Administrative determination of July 18, 1958 of loss of citizenship was binding and effective until it was impeached or set aside (*Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 525, 100 L. Ed. 1387, 76 S.Ct. 946; *Michigan R. Com.* v. *Detroit & M. R. Co.,* 178 Mich. 230, 144 N. W. 696, affd. 240 U.S. 564, 60 L. Ed. 802, 36 S.Ct. 424) and on both parties (*Shields* v. *Utah Idaho C. R. Co.,* 305 U. S. 177, 83 L. Ed. 111, 59 S.Ct. 160; 2 Am. Jur. 2d 291-292): This proposition of administrative law has been held to apply to a Certificate of Expatriation or Loss of Nationality issued and approved by the State Department in the case of *Linzalone* v. *Dulles,* 120 F. 2d 107, 109, in which court said and held:

> ". . . Such certification was a final administrative determination of plaintiff's loss of nationality by the Department of State. It finally denied the plaintiff the right or privilege as a national of the United States to have his status as such recognized and to be free from the obligation of appearing at and defending the deportation proceedings commenced subsequent to the certification of loss of his nationality."

It is the petitioner's further contention that the standard adopted by the Court of Appeals: "It is sufficient that the government's (obligations) stem from its de jure relationship without regard to the subjective quid pro quo in any particular case.", (Appendix B, infra., p. 25) is contrary to the sense of justice and fair play embodied in our judicial system, and has no basis in law.

Thousands of persons whose expatriations were voided as a result of Schneider and Afroyim will come under the broad sweep of the decision of the First Circuit in this case, and that decision is erroneous for the following reasons:

II.

1. During the years 1959 through 1961 petitioner resided in the Dominican Republic and as none of his alleged income was from sources within the United States, nor was he engaged in a trade or business in the United States, the only basis for taxation would have been the existence of a status of citizen of the United States (*Tait* v. *Cook,* 256 U. S. 47, 68 L. Ed. 895; 26 USC § 871, 1958 Edition, (Appendix D, pp. 32-36)[6] but as one of the

[6] This section of the Internal Revenue as amended through September 21, 1961 was the basis of the imposition of tax on non-resident aliens, and would be applicable to the taxable years in question.

elements of citizenship was missing, that is, the enjoyment of full civil rights and the protection of the laws of the United States, there was no basis for his taxation during this period.

The following is the definition of a citizen set forth in Black's Law Dictionary:

> "One who under the constitution and laws of the United States, or of a particular state, and by virtue of birth or naturalization within the jurisdiction is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights."
> *Black's Law Dictionary,* Third Ed. page 329, citing *U. S.* v. *Cruikshank,* 92 U.S. 542.
>
> . . . . . .
>
> "Citizenship is a membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of society. These are reciprocal obligations, one being a compensation for the other." (*Luria* v. *United States,* 58 L. Ed. 101-105, 231 U.S. 9, 34 S.Ct. 10, 23; 3 Am. Jur. 2d 982).

During the period from July 18, 1958 to June 25, 1962 petitioner occupied the status of a non-resident alien and had no protection nor any of the other rights and privileges of citizenship. As a matter of fact he was not an American citizen during said period, nor can he now be made one during that period in fact, any more than his vessels be registered as American vessels during that period. That period has transpired and it cannot be recalled and recast in a different mold. The application of legal formulae such a "void ab initio", or "absolutely void and of no effect", cannot alter this factual reality.

2. Liability to taxation is based on the individual's reciprocal enjoyment of the benefits of government and as the petitioner was beyond the reach of government benefits he was likewise beyond the scope of the taxing power.

In *Fitch, et al* v. *Wisconsin Tax Commission, et al,* 230 N.W. 37, 201 Wis. 383, the executors of an estate applied for a determination of the amount of income tax due from the income of the estate during the year 1928, the estate was distributed and went out of existence in 1928, but the assessor of taxes assessed a mythical or assumed income tax for the year 1929 and 1930.

In holding this tax assessment unlawful and unjustly imposed the Court at page 38 N.W. held that the justification of taxation is found in the reciprocal duties of protection and support between the government and the citizen, and that

> "The exaction of a tax can only be justified from one who is enjoying the protection of government either for himself or for his property. . . .".

In *M'Culloch* v. *The State of Maryland, et al,* 4 Wheat 316 at 4 L. Ed. 579, Chief Justice Marshall, when speaking of the scope of the taxing power of the sovereign states at page 429 U.S.:

> "It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is incident. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend, are upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self evident."

Following this basic principle we must conclude that as the power of the United States Government did not ex-

tend over the petitioner during the period in question, petitioner was not taxable during this period.

Mr. Justice Brown in the case of *Union Refrigerator Transit Company* v. *The Commonwealth of Kentucky,* 199 U.S. 194, 50 E. Ed. 150, in holding that due process of law was denied a Kentucky corporation by a tax assessment upon authority of a Kentucky statute where the corporation's rolling stock was permanently located in other states and employed there in the prosecution of its business, stated:

> "'The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in addition to the value of such property, or in the creation and maintenance of public conveniences in which he shares, — such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this Court to be beyond the power of the legislature in the taking of property without due process of law.'"[7]

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[7] This decision has been distinguished in that a tax may be made to cover the enhanced value which comes to the property in the state through its organic relation to the system. *Pullman Co.* v. *Richardson,* 261 U.S. 330, 67 L Ed. 682, 43 S. Ct. 366, but the basic principle enunciated in Justice Brown's above cited statement remains valid.

3. That the only basis for taxing the petitioner is by the creation of a legal fiction, which is contrary to law.

An individual and a citizen, unlike a corporation, is not subject to tax for the mere privilege of existing and owning property, which are natural rights, *Redfield* v. *Fisher,* 292 p. 813, 135 Or. 180, but is taxed as a result of being a member of a political community which affords him the protection of its laws.

The only basis for taxing the petitioner would be through the creation of a legal fiction, that is, that the government by its very existence benefits an individual who is not a member of the government's society nor entitled to its benefits.

> "While fictions are sometimes invented in order to realize the judicial conception of justice, we cannot define the constitutional guaranty in terms of a fiction so unrelated to reality without creating as many tax injustices as we would avoid and without exercising a power to remake constitutional provisions which the Constitution has not given to the Courts." *Curry* v. *McCanless,* 307 U. S. 357, 374, 83 L. Ed. 1339, 1351.

If this fiction is created, the petitioner will be taxed during the period in question on the basis of his mere existence, and not on the basis of his membership in a political society, we believe that this is directly contrary to the basic premise of democracy, that man does not exist to serve the state, but the state exists to serve the man.

Conclusion

For the Reasons Stated, it is respectfully submitted that this petition for certiorari should be granted.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 67-64

UNITED STATES OF AMERICA,
Plaintiff,
v.
FELIX BENITEZ REXACH, THE
ESCAMBRON DEVELOPMENT COMPANY,
ET AL.,
Defendants.

MEMORANDUM

APPEARANCES:
For Plaintiff:
Francisco A. Gil., Jr., *United States Attorney,*
San Juan, Puerto Rico.
For Defendant:
Rene Benitez, Esq.,
San Juan, Puerto Rico.

VAN PELT, Judge.

This matter is before the court upon the motion of defendant Felix Benitez Rexach for summary judgment.

Plaintiff brought suit against the defendant as an American citizen residing in Puerto Rico, and others, to foreclose tax liens on property in Puerto Rico of the moving defendant, and in effect to collect jeopardy assessments, including fraud penalties, made against Felix Benitez Rexach, who will hereafter be called the defendant, for the calendar years 1959 and 1961, in the approximate sum of three million dollars.

The basic facts are not in serious dispute. Defendant

was born in Puerto Rico in 1886. By virtue thereof, he became a citizen of the United States on March 2, 1917, pursuant to the Puerto Rico Organic Act of 1917 (39 Stat. 951, 953). He became a domiciliary resident of the Dominican Republic in 1944 and remained such until approximately 1962. Defendant engaged in the construction business while in the Dominican Republic and had contracts with the Dominican Republic for harbor works totaling more than thirty million dollars. He had previous United States income tax litigation for the years 1951 through 1956 involving, among other things, claimed business expense in the form of "kick backs" to Dictator Trujillo of the Dominican Republic.

On July 14, 1958 he appeared before the United States Consulate in the Dominican Republic and filed a renunciation of his American citizenship. He served the Dominican Republic in several capacities, including diplomatic service and was given high honors and decorations as a result of his service, — or the court must add, and a result of his friendship with Trujillo. Afterwards, in 1961, he received payment from the Dominican Republic on a claim for additional compensation which had been earlier denied by the Dominican Republic, of $1,552,000 on orders of the Dictator. This sum was immediately returned to the Dominican treasury in payment of Dominican taxes owed by the defendant for the years 1951 through 1956 (See deposition of the former Secretary of Public Works and of the former Secretary of Finance of the Dominican Republic.). By virtue of this payment, he claimed, and received, large foreign tax credits against his tax liabilities to the United States for the years 1951 through 1956. It is the receipt of this $1,552,000 which plaintiff is seeking to tax and collect taxes thereon in this suit.

On March 2, 1962 after the assassination of the Dictator, defendant appeared at the United States Consulate in the

City of Santo Domingo in the Dominican Republic requesting that a passport be issued to him and claiming that he was a citizen of the United States. On the basis of the renunciation of July 14, 1958, it was refused. With his application he filed an affidavit, a copy of which is attached to the plaintiff's opposition to this motion for summary judgment, in which he recites that the renunciation of July 14, 1958 was not voluntary, was made under duress and coercion of the Dictator and because of threats against him and his property. He claimed that it did not operate to divest him of citizenship and should be considered "null and void and of no effect." The Consulate denied him a passport.

Defendant contested the decision of the Consulate before the Board of Review on Loss of Nationality in the passport office of the State Department. On June 25, 1962, the Board sustained his claim and held that the 1958 renunciation was made under duress and coercion and was not voluntary and that he had not divested himself of his American citizenship. Thereupon, a United States passport was issued him.

The parties agree that this litigation will largely stand or fall on the decision on this motion. If defendant was not a citizen during the years following the revocation and until 1962, no tax is collectible on the $1,552,000. If he was a citizen, then the suit can be maintained and taxes in some amount are payable.

The recent case of *Beys Afrovim* v. *Rusk*, 387 U.S. 253, discusses at length the history of attempts to strip a person of citizenship by Congressional enactment. While not in point on the facts, it contains statements of the law that have a bearing here. Among them, that it is not the government but the individual who has the right and the only power of expatriation. The majority opinion ends on a note that a citizen has "a substantial right to remain a

citizen in a free country unless he voluntarily relinquishes that citizenship." (p. 268) See also *Hedelsohn* v. *Dulles*, 207 F.2d 37 (D.C. Cir. 1953); *Acheson* v. *Murakami*, 176 F.2d 953 (9 Cir. 1949).

The basic question, therefore, is whether the defendant voluntarily renounced his citizenship in 1958. If he did not, then ever since 1917 he has been a citizen of the United States.

Defendant's position prior to this litigation was clear. It was that the renunciation was not voluntary. Specifically, he claimed that it was under duress and the result of threats by the dictator. It is not consistent to hold that the renunciation was effective during the period of duress and that defendant regained his citizenship when the passport was issued him. If the renunciation was effective, then defendant would not become a citizen of the United States until he regained his citizenship from naturalization. If the renunciation was void, then he never lost his citizenship.

Without comment upon whether defendant's dealings with the Dictator Trujillo and the Dominican Republic met any approved moral or ethical standards, it does appear as the Government contends, that the defendant makes his claim to suit his interest at the time. Such action is not viewed by the court with sympathy. The courts cannot permit a person to wear a mantle of citizenship when the person wishes or finds it profitable and lay it aside when it is unprofitable.

It seems clear to the court from the evidence before it that the defendant was under duress and compulsion when he made his renunciation in 1958, and that he never voluntarily relinquished his citizenship. In that event, it was void from the beginning.

It follows that the motion for summary judgment must be overruled.

Dated: November 20, 1967

EXHIBIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 67-64

UNITED STATES OF AMERICA,
Plaintiff,
v.
FELIX BENITEZ REXACH; THE
ESCAMBRON DEVELOPMENT COMPANY,
ET AL.,
Defendants.

ORDER

This matter is before the court upon the motion for amendment of order filed by defendant Rexach on November 28, 1967, to permit an appeal to be taken as provided under 28 U.S.C.A. 1292(4)(b).

The court is of opinion that the order heretofore entered involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, and if the court was in error in overhauling said motion it can result in the saving of a great amount of time of the court, and that defendant should be permitted to address an appeal to the U. S. Court of Appeals for the First Circuit within ten days from the date of this order.

IT IS THEREFORE ORDERED BY THE COURT that the order of this court dated November 20, 1967 and filed November 24, 1967 be and the same is hereby amended to include as a part thereof this order and the findings herein.

IT IS FURTHER ORDERED, and the court here states in writing, that the order and decision of this court overruling the Motion for Summary Judgment involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such order may materially advance the ultimate termination of the litigation and that the defendant should have the opportunity to apply to the U. S. Court of Appeals for the First Circuit within ten days from the entry of this order for permission to take an appeal to said court from this order.

Dated: November 30, 1967.

BY THE COURT:
(s) ROBERT VAN PELT
Judge, United States District Court
By Assignment.

Appendix B

United States Court of Appeals
For the First Circuit

No. 7052.

FELIX BENITEZ REXACH,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Walter L. Newsom, Jr., with whom *Rene Benitez Rexach* and *Brown, Newsom & Cordova* were on brief, for appellant.

Mitchell Rogovin, Assistant Attorney General, with whom *Francisco A. Gil, Jr.*, United States Attorney, and *Meyer Rothwacks*, *Thomas Silk*, *Louis M. Kauder*, *John J. McCarthy* and *Jerome H. Fridkin*, Attorneys, Department of Justice, were on brief, for appellee.

March 11, 1968.

ALDRICH, *Chief Judge*.

This is an appeal by permission under 28 U.S.C. § 1292 (b) from the denial of defendant's motion for a summary judgment dismissing the complaint. The record consists of certain stipulations and exhibits, and the testimony of the defendant, warranting the following findings.[1]

[1] We use the word "warrant," although we might be prepared to say "compels." However, the government did not move for a partial summary judgment, so we will not decide that question.

Felix Benitez Rexach, hereafter taxpayer, a native-born Puerto Rican became an American citizen by virtue of the Jones Act of March 2, 1917, 48 U.S.C. §§ 731 et seq. In 1944 he left Puerto Rico and became a resident of the Dominican Republic, where he remained until 1961. In July 1958 he executed a written renunciation of his American citizenship before a United States consulate official in the Dominican Republic pursuant to the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481(a)(6). A certificate of loss of nationality was duly approved by the Department of State. On July 26 taxpayer was decreed to be a citizen of the Dominican Republic. Thereafter, he naturally suffered certain losses of status and benefits as a consequence of being declared a non-resident alien of the United States.

Taxpayer was engaged in large scale contracting activities in the Dominican Republic in connection with the then dictator, Trujillo. In 1961 Trujillo was assassinated. The following year taxpayer applied for an American passport, claiming that his 1958 renunciation was not voluntary but had been compelled, against his will, by economic pressure and physical threats that he feared to resist. The United States Consul denied his application, and taxpayer appealed to the Department of State. The Board of Review on the Loss of Nationality took taxpayer's testimony and accepted it, as a result of which his certificate of loss of nationality was cancelled, and his passport application granted. There followed the present chapter. The Commissioner of Internal Revenue assessed taxpayer with an income tax on account of income earned in the Dominican Republic during the years following his renunciation of citizenship, alleged to be due because of his continued American citizenship. *Cook* v. *Tait,* 1924, 265 U.S. 47. Taxpayer not responding, the present suit was brought to foreclose liens in payment of such taxes. Taxpayer moved, unsuccessfully, for summary judgment on the claim that no taxes could be due.

Taxpayer concedes that as a matter of law he is precluded by the record from claiming that he ever ceased to be a United States citizen, and concedes that during the period in question he was a de jure citizen. However, he says that he was not a "de facto" citizen.

> "Appellant does not claim that his citizenship was lost as a result of the renunciation, but that as a result of the determination of the Secretary of State and consequent issue of the Certificate of Loss of Nationality, the United States was freed of its obligations to him as a citizen and he in fact lived and existed as an alien to the United States during the period in question."

He concludes that since the United States "owed" him, or apparently owed him, no citizen's protection, he, in turn, owed no tax.

While there is language in *Cook* v. *Tait, supra,* indicative that these are reciprocal obligations, the Court also observed that "government by its very nature benefits the citizen...." 265 U.S. at 56. We cannot agree that the reciprocal obligations are mutual, at least in the sense that taxpayer contends. It is insufficient that the government's stem from its de jure relationship without regard to the subjective quid pro quo in any particular case. We will not hold that assessment of benefits is a prerequisite to assessment of taxes.[2]

Affirmed.

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[2] The hypotheticals suggested by taxpayer during oral argument involved aspects of estoppel on the part of the government. Whatever may be the merit of such cases, that element is not present here.

Adm. Office, U. S. Courts — Blanchard Press, Boston, Mass.

Appendix C

EXHIBIT C

Govt. Ex. 38

BOARD OF REVIEW ON THE
LOSS OF NATIONALITY
PASSPORT OFFICE

Identification No. 38
For (Illegible)
June 25, 1962

Case of: FELIX BENITEZ REXACH

This matter comes before the Board of Review on the Loss of Nationality as an appeal from a determination by the Department of State, dated July 18, 1958, that Felix Benitez Rexach lost his United States citizenship pursuant to Section 349(a)(6) of the Immigration and Nationality Act of 1952, as amended, by formally renouncing in due and prescribed form such citizenship before a consular officer of the United States while abroad.

Briefly, the pertinent established facts of record and those alleged on appeal are: that Mr. Benitez Rexach was born at Vieques, Puerto Rico, on March 28, 1887, and acquired United States citizenship pursuant to the Act of March 2, 1917; that he currently is and has been acting for some years as a marine engineer; that in 1934 he departed Puerto Rico and went to the Dominican Republic for the purpose of fulfilling certain contracts executed between himself and the Dominican Government; that he resided in the Dominican Republic until 1940 when he returned to Puerto Rico where he remained until 1947 at which time he returned to the Dominican Republic and has since resided there; that in order to perform the above-stated contracts with the Dominican Government he purchased, imported and maintained several million dollars

worth of engineering equipment all of which currently remain in that country; that between 1944 and the present he has performed contracts in the Dominican Republic, the total price of which allegedly exceeds $30,000,000.00 of which an alleged amount of $10,000,000.00 was returned or "kicked back" to the Dominican Republic for the privilege of doing business; that in or about 1954 agents of the Internal Revenue Service of the United States Department of Treasury commenced investigating his United States income tax liability for moneys earned under contracts with the Dominican Republic between 1951 and 1956; that such investigations plus additional ones resulted in his notification in 1958 of a jeopardy assessment for income taxes in the amount of $2,350,000.00 and that suit was filed for the recovery of such amount in the United States District Court for Puerto Rico on March 3, 1958; that at approximately the same time the then current Government in the Dominican Republic was subjected to severe criticism in the United States and abroad due to internal conditions and, consequently, said Government pressured Mr. Benitez Rexach to secret the amounts returned to that Government for the privilege of doing business notwithstanding the tax recovery action commenced against him; that at about the same time the Dominican Government allegedly suggested that in order to prevent a worsening of external international relations growing out of the practices of that Government it would be wise if appellant ceased to be a citizen of the United States; that in connection with the United States tax suit then current Mr. Benitez Rexach was tentatively advised by his United States attorneys that he should determine from the Department of State whether he had expatriated himself in 1952 or 1953 by accepting the office of Commercial Adviser to the Dominican Embassy at Paris, France; that subsequently in 1958 both his attorneys and the Secretary of State concluded that he had

not expatriated himself by accepting the aforementioned position and that such determinations were conveyed to the then Dominican Government; that upon threats of financial and personal injury by the Dominican Government appellant renounced his United States citizenship on July 14, 1958; that on July 26, 1958, a decree conferring Dominican citizenship on appellant as of a time previous was issued by the then Government; and that, as a result of his action on July 14, 1958, the Department of State approved a certificate of loss of nationality on July 18, 1958.

The essence of Mr. Benitez Rexach's defense to his overt act of renouncing United States citizenship on July 18, 1958, is that he acted involuntarily and under coercion. In his own words:

> "On July 14, 1958, I made that declaration renouncing my United States citizenship without prejudice to the claim of loss in 1952 or 1953, and I so reported to the Dictator. I did not want to make this renunciation and I did not make it voluntarily. I did it because I knew that if I did not do so I would lose my business and properties in the Dominican Republic, that there was a probability that I might lost my liberty and always the possibility that I might suffer bodily harm. Fatal accidents frequently happened in the Dominican Republic to persons regarded as inimical to the interests of the Dictator."

In connection with this allegation, appellant has introduced a wealth of independent evidence corroborating and substantiating the reality and well-foundedness of his fear not only of business ruin but actual physical harm, Also, public information available to the Board of Review concerning the practices of the then Dominican Government are noted as further corroborating Mr. Benitez Rexach's fears.

There is under current statutes and interpretations no

question but what Congress by enacting the so-called expatriation laws of the United States intended to recognize the right of a United States citizen to surrender his citizenship by enumerating certain acts which evidenced an intent to renounce such citizenship. *Perkins* v. *Elg*, 307 U.S. 325; *Mackenzie* v. *Hare*, 239 U.S. 299; *Ex Parte Griffin*, 237 F. 445; *Citizenship of Mrs. Berryman*, 30 *Ops. Atty. Gen.* 412. However, in view of the fact that American citizenship is perhaps the most precious right known to man today it should not be lightly taken away. *Acheson* v. *Paenza*, 202 F.2d 453, 456. Consequently, it has been consistently held that where the fact that an individual was at one time a United States citizen has been established and the Government recognizes such status by claiming it has been forfeited under law, it devolves upon the party asserting expatriation to prove the validity thereof in a manner that does not leave the issue in doubt. *Delmore* v. *Brownell*, 236 F.2d 598; *Mah Toi* v. *Brownell*, 219 F.2d 642. Also see *Gonzalez* v. *Landon*, 350 U.S. 920.

In order, therefore, that Mr. Benitez Rexach may be held to have expatriated himself by formally renouncing his United States citizenship, it is necessary that the Government disprove by a preponderance of the evidence appellant's allegation, if substantiated, that he acted involuntarily and under extrinsic coércion at the time he executed the pertinent document before a consular representative of the United States.

It is a fundamental rule of all fields of human endeavor, especially those relating to human conduct under law, that conspicuously performed acts are presumed voluntary. Wigmore, *Evidence* (3rd Ed.), Vol. 3, sec. 860; F.R.C.P. sec. 8(c). Another way of expressing the same axiom is that a voluntary act is one proceeding from one's own choice or full consent unimpelled by another's influence. *Nakashima* v. *Acheson*, 98 F. Supp. 11.

It is similarly well established that today a United States citizen cannot be divested of such citizenship without his consent and the latter may result only from his voluntary conduct. *Nishikawa* v. *Dulles*, 356 U.S. 129; *Mackenzie* v. *Hare*, 239 U.S. 299; *United States* v. *Wong Kim Ark*, 169 U.S. 649; *Osborn* v. *United States*, 9 Wheat. 38. To determine whether any act of alleged expatriation was performed voluntarily or involuntarily, it is necessary to examine all relevant facts and circumstances which may have caused the alleged actor to have departed from the exercise of free choice and respond to compulsion by others. *Nakashima* v. *Acheson, supra.*

The Board has carefully examined all facets of this case as well as the evidence going to the circumstances under which the appellant purportedly renounced his United States citizenship. Mr. Benitez Rexach has alleged and submitted corroborating evidence to the effect that his formal renunciation of United States citizenship was an act compelled by not only fear of financial loss or ruin, but also that he was, in fact, in fear of his personal safety if he refused to obey the alleged commands of the Dominican Government to divest himself of his American status.

While there may exist certain aspects of the record which are not totally clear or consistent, the Board is bound by judicial precedent to resolve any and all doubts arising therefrom in the favor of Mr. Benitez Rexach. *United States* v. *Minker*, 350 U.S. 179; *Baumgartner* v. *United States*, 322 U.S. 665; *Schneiderman* v. *United States*, 320 U.S. 118; *Stipa* v. *Dulles*, 233 F.2d 551; *Alata* v. *Dulles*, 221 F.2d 52; *Fletes-Wora* v. *Rogers*, 160 F. Supp. 215; *Yee Yee* v. *Dulles*, 136 F. Supp. 199; *Gay* v. *Brownell*, 120 F. Supp. 319.

Evidence rebutting or tending to affirm the contrary of Mr. Benitez Rexach's position on appeal is not particularly impressive nor present in any magnitude. What little there is appears to lead to a conclusion that it was the Depart-

ment's previous position that appellant acted totally out of self-interest and freely in renouncing his citizenship. Comparing such evidence with that submitted in opposition, the Board is of the opinion that appellant's evidence meets the requirements of Section 349(c) of the Immigration and Nationality Act of 1952, as amended, and thereby successfully rebuts any presumption or allegation of the fact of voluntariness by a preponderance. While not directly in point, the Board also considers pertinent to this consideration the comments dicta of the United States Court of Appeals for the 9th Circuit in *Acheson* v. *Nurakami* (176 F.2d 953). Therein the court in discussing the affect of a formal renunciation of United States citizenship under Section 401(i) of the Nationality Act of 1940, as amended, stated and held that such a renunciation was insufficient if made under evidence establishing fear and duress.

Accordingly, the Department's previous determination that Mr. Felix Benitez Rexach expatriated himself under Section 349(a)(6) of the Immigration and Nationality Act of 1952, as amended, is reversed.

(s) JAMES E. COTTER
JAMES E. COTTER, *Chairman*
(s) LYNN N. PETERSON, JR.
LYNN N. PETERSON, JR.
(s) DONALD K. DUVALL
DONALD K. DUVALL

130—BENITEZ REXACH, FELIX

Appendix D

SEC. 871. TAX ON NONRESIDENT ALIEN INDIVIDUALS

(a) NO UNITED STATES BUSINESS AND GROSS INCOME OF NOT MORE THAN $15,400.—

(1) IMPOSITION OF TAX. — Except as otherwise provided in subsection (b) there is hereby imposed for each taxable year, in lieu of the tax imposed by section 1, on the amount received, by every nonresident alien individual not engaged in trade or business within the United States, from sources within the United States, as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (including amounts described in section 402(a) (2), section 403(a)(2), section 631(b) and (c), and section 1235, which are considered to be gains from the sale or exchange of capital assets), a tax of 30 percent of such amount.

(2) CAPITAL GAINS OF ALIENS TEMPORARILY PRESENT IN THE UNITED STATES. — In the case of a nonresident alien individual not engaged in trade or business in the United States, there is hereby imposed for each taxable year, in addition to the tax imposed by paragraph (1) —

(A) if he is present in the United States for a period or periods aggregating less than 90 days during such taxable year — a tax of 30 percent of the amount by which his gains, derived from sources within the United States, from sales or exchanges of capital assets effected during his presence in the United States exceed his losses,

allocable to sources within the United States, from such sales or exchanges effected during such presence; or

(B) if he is present in the United States for a period or periods aggregating 90 days or more during such taxable year from sources within the United States, from sales or exchanges or capital assets effected at any time during such year exceed his losses, allocable to sources within the United States, from such sales or exchanges effected at any time during such year.

For purposes of this paragraph, gains and losses shall be taken into account only if, and to the extent that, they would be recognized and taken into account if such individual were engaged in trade or business in the United States, except that such gains and losses shall be computed without regard to section 1202 (relating to deduction for capital gains) and such losses shall be determined without the benefits of the capital loss carryover provided in section 1212.

(b) No United States Business and Gross Income of More Than $15,400. — A nonresident alien individual not engaged in trade or business within the United States shall be taxable without regard to subsection (a) if during the taxable year the sum of the aggregate amount received from the sources specified in subsection (a)(1), plus the amount by which gains from sales or exchanges of capital assets exceed losses from such sales or exchanges (determined in accordance with subsection (a) (2) is more than $15,400, except that —

(1) the gross income shall include only income from the sources specified in subsection (a) (1) plus any gain (to the extent provided in subchapter P; sec. 1201 and following, relating to capital gains and

losses) from a sale or exchange of a capital asset if such gain would be taken into account were the tax being determined under subsection (a) (2);

(2) the deductions (other than the deduction for charitable contributions and gifts provided in section 973(c) shall be allowed only if and to the extent that they are properly allocable to the gross income from the sources specified in subsection (a), except that any loss from the sale or exchange of a capital asset shall be allowed (to the extent provided in subchapter P without the benefit of the capital loss carryover provided in section 1212) if such loss would be taken into account were the tax being determined under subsection (a) (2). If (without regard to this sentence) the amount of the taxes imposed in the case of such an individual under section 1 or under section 1201 (b), minus the sum of the credits under sections 34 and 35, is an amount which is less than 30 percent of the sum of —

(A) the aggregate amount received from the sources specified in subsection (a) (1), plus

(B) the amount, determined under section (a) (2), by which gains from sale or exchanges of capital assets exceed losses from such sales or exchanges.

then this subsection shall not apply and subsection (a) shall apply. For purposes of this subsection, the term "aggregate amount received from the sources specified in subsection (a) (1)" shall be applied without any exclusion under section 116.

(c) UNITED STATES BUSINESS. — A nonresident alien individual engaged in trade or business within the United States shall be taxable without regard to subsection (a). For purposes of part I, this section, sections 881 and 882, and chapter 3, the term "engaged in trade or business

within the United States" includes the performance of personal services within the United States at any time within the taxable year, but does not include the performance of personal services —

(1) for a nonresident alien individual, foreign, partnership, or foreign corporation, not engaged in trade or business within the United States, or

(2) for an office or place of business maintained by a domestic corporation in a foreign country or in a possession of the United States,

by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of 90 days during the taxable year and whose compensation for such services does not exceed in the aggregate $3,000. Such terms do not include the effecting, through a resident broker, commission agent, or custodian, of transactions in the United States in stocks or securities, or in commodities (if of a kind customarily dealt in on an organized commodity exchange, if the transaction is of the kind customarily consummated at such place, and if the alien, partnership, or corporation has no office or place of business in the United States at any time during the taxable year through which or by the direction of which such transactions in commodities are effected).

(d) PARTICIPANTS IN CERTAIN EXCHANGE OR TRAINING PROGRAMS. — For purposes of this section, a nonresident alien individual who (without regard to this subsection) is not engaged in trade or business within the United States and who is temporarily present within the United States as a nonimmigrant under subparagraph (F) or (J) of section 101 (a)(15) of the Immigration and Nationality Act, as amended, shall be treated as a nonresident alien individual engaged in trade or business within the United States.

(e) CROSS REFERENCES. —

(1) For doubling of tax on citizens of certain foreign countries, see section 891.

(2) For tax treatment of certain amounts distributed by the United States to nonresident alien individuals, see section 402 (a) (4).

Aug. 16, 1954, c. 736, 68A Stat. 278; Sept. 2, 1958, Pub.L. 85-866, Title I, §§ 40(a), 72 Stat. 1638, 1639; Apr. 22, 1960, Pub.L. 86-437, § 2 (b), 74 Stat. 79; Sept. 21, 1961, Pub.L. 87-256, § 110(b), 75 Stat. 535.

"§ 1481. LOSS OF NATIONALITY BY NATIVE-BORN OR NATURALIZED CITIZEN; VOLUNTARY ACTION

(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

(1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: Provided, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: And provided further, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a parent or parents, may, within one year from the effective date of this chapter, apply for a visa and for admission to the United States

as a nonquota immigrant under the provisions of section 1101(a)(27)(E) of this title; or

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: Provided, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

(4) (A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(6) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(7) making in the United States a formal written renunciation of nationality in such form as may be

prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces; Provided, That notwithstanding loss of nationality or citizenship under the terms of this chapter or previous laws by reason of desertion committed in time of war, restoration to active duty with such military, air or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost; or

(9) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of Title 18, or willfully performing any act in violation of section 2385 of Title 18, or violating section 2384 of Title 18 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction; or

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or dur-

ing a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

(b) Any person who commits or performs any act specified in subsection (a) of this section shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totaling ten years or more immediately prior to such act.

(c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b) of this section, any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

(June 27, 1952, c. 477, Title III, ch. 3, § 349, 66 Stat. 267, as amended Sept. 3, 1954, c. 1256, § 2, 68 Stat. 1146; Sept. 26, 1961, Pub. L. 87-302, § 19, 75 Stat. 656.)

SUPREME COURT, U. S.

FILED
JUL 10 1968
JOHN F. DAVIS, CLERK

No. 176

In the Supreme Court of the United States

OCTOBER TERM, 1968

FELIX BENITEZ REXACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

MITCHELL ROGOVIN,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question in this case is whether petitioner should be taxed as a citizen or as an alien for the period between his 1958 renunciation of citizenship and the State Department's acceptance of his 1962 assertion that the renunciation had been involuntary and ineffective.

For many years petitioner resided in the Dominican Republic, where he had extensive business interests. On July 14, 1958, he made a formal, written renuncia-

tion of his United States citizenship before a United States consular officer in the Dominican Republic as allowed by Section 349(a)(6) of the Immigration and Nationality Act, c. 477, 66 Stat. 163, 268 (8 U.S.C. 1481(a)(6)). (Pet. 18, 24, 36-37.) In March 1962, following the fall of the Trujillo regime, petitioner sought an American passport in Santo Domingo, stating that his 1958 renunciation had been involuntary. The passport was denied at the consular level, but upon referral of the issue to the Department of State, the Board of Review on the Loss of Nationality, on June 25, 1962, accepted petitioner's claim that his renunciation was compelled by his fear of financial ruin and physical harm at the hands of the Dominican government. The Board thereupon reversed the 1958 determination that petitioner had expatriated himself and a passport was issued. (Pet. 18-19, 24-31).

The Commissioner of Internal Revenue asserted jeopardy assessments against petitioner for the calendar years 1959 and 1961 and the United States brought this action to satisfy those assessments by enforcing liens on petitioner's property in Puerto Rico. The assessments were based on petitioner's receipt of $1,552,000 from the Dominican Republic in 1961 on his claims for services performed from 1951 through 1956.[1] (Pet. 18). Petitioner moved for summary judgment on the ground that his renuncia-

[1] Petitioner had paid the $1,552,000 to the Dominican Government as taxes for 1951 through 1956 and received foreign tax credits against his United States taxes for 1951 through 1956.

tion of citizenship gave him, for tax purposes, the status of an alien during those years.[2] The district court denied the motion, but certified the question for interlocutory appeal pursuant to 28 U.S.C. 1292(b). (Pet. 17-22). The court of appeals affirmed (Pet. 23-25).

The decision below is correct and raises no conflict with other decisions. It is not of general importance in the administration of the tax laws, and there is no other reason for further review.

1. The court of appeals correctly held that petitioner never lost his status or his obligations as a United States citizen and therefore is subject to income taxation as a citizen for the years in issue. The procedure itself followed, and the order vacating his expatriation, necessarily signifies an unbroken continuity in his citizenship. On no other theory could petitioner have regained his passport without naturalization proceedings. See, *e.g.*, *Sittler* v. *United States*, 316 F.2d 312 (C.A. 2); *Petition of Sproule*, 19 F. Supp. 995

[2] Special provisions for the taxation of the income of nonresident aliens are set forth in Sections 871-878 of the Internal Revenue Code of 1954. In general the tax is limited to income from businesses or other sources within the United States. A citizen, on the other hand, escapes taxation only on "amounts received from sources, without the United States * * * which constitute earned income attributable to services performed" either while (Section 911(a)(1)) "a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year" or (Section 911(a)(2)) "who during any period of 18 consecutive months is present in a foreign country or countries during at least 510 full days." Generally speaking, citizens (Section 901(b)(1)) and aliens (Sections 901(b)(3), 901(b)(4), 906) receive credit against United States taxes for taxes paid to foreign governments.

(S.D. Calif.); Act of June 14, 1902, c. 1088, 32 Stat. 386, amending Section 4076, Revised Statutes (22 U.S.C. 212). Having demanded and received a decision that he never lost his status as a citizen there can be no foundation for allowing him an exemption from taxation which is only available to aliens. See *Cook* v. *Tait*, 265 U.S. 47.

2. As the court of appeals noted (Pet. 25), petitioner conceded "that as a matter of law he is precluded by the record from claiming that he ever ceased to be a United States citizen." Thus petitioner's argument that he (Pet. 13) "occupied the status of a non-resident alien" during the years in question and that (*ibid.*) "[a]s a matter of fact he was not an American citizen during said period," was not properly raised below and should not be considered here. See *United States* v. *Fleischman*, 339 U.S. 349; *Federal Trade Commission* v. *Travelers Health Assn.*, 362 U.S. 293.

3. Petitioner's status is not comparable to that of persons expatriated under Section 349(a) of the Immigration and Nationality Act, *supra* (8 U.S.C. 1481) (Pet. 36-39) and whose expatriations may be invalid by reason of this Court's decision in *Afroyim* v. *Rusk*, 387 U.S. 253. The interim status of such persons presents difficult questions which may or may not lead to the result reached in the present case, since they were expatriated irrespective of their personal desire to maintain their United States citizenship. Here, in contrast, the State Department has done what petitioner wanted it to do. The duty to pay taxes does not depend on the taxpayer's actually en-

joying specific benefits from the operations of the government during the years in question, as petitioner would have it (Pet. 12-16), but, rather, on the power of the legislature to tax citizens wherever they or their property might be found, a power premised "on the presumption that government by its very nature benefits the citizen and his property wherever found." *Cook* v. *Tait*, *supra*, 265 U.S. at 56.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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CERTIORARI DENIED